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10 **UNITED STATES DISTRICT COURT**  
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 DAVID JON MARTIN (TRUST),  
13  
14 Plaintiff,

Case No. 15-cv-290-BAS(DHB)

**ORDER GRANTING  
DEFENDANTS' MOTION TO  
DISMISS**

15 v.

**[ECF No. 29]**

16 VA REGIONAL SAN DIEGO  
17 BENEFIT OFFICE, *et al.*,  
18 Defendants.

19  
20 On February 12, 2015, Plaintiff David Jon Martin (Trust), proceeding *pro se*,  
21 commenced this action for alleged constitutional violations and breach of contract  
22 arising from the denial of pension benefits against Defendants VA Regional San Diego  
23 Benefit Office ("VA"), Gary Chesterton, Patrick Prieb, and "Assistant Director /  
24 Agents and / or Assigns." Defendants now move to dismiss this action pursuant to  
25 Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiff opposes.

26 The Court finds this motion suitable for determination on the papers submitted  
27 and without oral argument. *See* Civ. L.R. 7.1(d)(1). For the following reasons, the  
28 Court **GRANTS** Defendants' motion to dismiss.

## 1 I. LEGAL STANDARD

2 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Life*  
 3 *Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). “They possess only that power authorized  
 4 by Constitution or a statute, which is not to be expanded by judicial decree.” *Id.*  
 5 (internal citations omitted). “It is to be presumed that a cause lies outside this limited  
 6 jurisdiction and the burden of establishing the contrary rests upon the party asserting  
 7 jurisdiction.” *Id.* (internal citations omitted); *see also Abrego Abrego v. The Dow*  
 8 *Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006).

9 “Subject matter jurisdiction based upon diversity of citizenship requires that no  
 10 defendant have the same citizenship as any plaintiff.” *Tosco Corp. v. Communities for*  
 11 *a Better Env’t*, 236 F.3d 495, 499 (9th Cir. 2001) (per curiam), *abrogated on other*  
 12 *grounds by Hertz Corp v. Friend*, 130 S. Ct. 1181 (2010). Alternatively, federal  
 13 district courts also have “original jurisdiction of all civil actions arising under the  
 14 Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331. “A plaintiff  
 15 suing in federal court must show in his pleading, affirmatively and distinctly, the  
 16 existence of whatever is essential to federal jurisdiction, and, if he does not do so, the  
 17 court . . . on discovering the [defect], must dismiss the case, unless the defect be  
 18 corrected by amendment.” *Tosco*, 236 F.3d at 499 (quoting *Smith v. McCullough*, 270  
 19 U.S. 456, 459 (1926)).

## 21 II. ANALYSIS

22 Defendants challenge this Court’s subject matter jurisdiction over both claims  
 23 Plaintiff asserts in his First Amended Complaint (“FAC”). With respect to Plaintiff’s  
 24 allegation that Defendants wrongfully denied his claims for pension benefits,  
 25 Defendants argue that district courts lack jurisdiction over VA benefit disputes under  
 26 *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) and the  
 27 Veterans’ Judicial Review Act (“VJRA”). (Defs.’ Mot. 2:15–3:12.) With respect to  
 28 the breach-of-contract claim, Defendants argue that district courts lack jurisdiction over

1 contract claims against the United States pursuant to the Contract Disputes Act  
 2 (“CDA”) in conjunction with the Tucker Act and the Little Tucker Act. (Defs.’ Mot.  
 3 3:13–4:10.) Plaintiff believes Defendants are mistaken based on various theories.

4  
 5 **A. *Veterans for Common Sense* and the VJRA**

6 In *Veterans for Common Sense*, the Ninth Circuit examined the VJRA, 38 U.S.C.  
 7 § 511, and concluded that “§ 511 precludes jurisdiction over a claim if it requires the  
 8 district court to review ‘VA decisions that relate to benefits decisions,’ including ‘any  
 9 decision made by the Secretary in the course of making benefits determinations.’”  
 10 *Veterans for Common Sense*, 678 F.3d at 1025 (citations omitted). The court went on  
 11 to explain that “[t]his standard is consistent with Congress’s intention to ‘broaden the  
 12 scope’ of the judicial preclusion provision . . . and is reflected in § 511’s plain  
 13 statement that [federal courts] may not review ‘a decision by the Secretary under a law  
 14 that affects the provision of [veterans’] benefits[.]” *Id.* (citations omitted). “This  
 15 preclusion extends not only to cases where adjudicating veterans’ claims requires the  
 16 district court to determine whether the VA acted properly in handling a veteran’s  
 17 request for benefits, but also to those decisions that may affect such cases.” *Id.* “If that  
 18 test is met, then the district court must cede any claim to jurisdiction over the case, and  
 19 parties must seek a forum in the Veterans Court and the Federal Circuit.” *Id.* at 1026.

20 In the FAC, Plaintiff alleges the following:

21 On multiple occasions the Veteran made claims for a pension  
 22 since 2007 only to be denied summarily because the United  
 23 States Department of Veteran Affairs and its agencies have  
 24 stated the Veteran’s military service was during peacetime.  
 25 Because of these denials[,] the Veteran is stating his 5th  
 26 Amendment of the U.S. Constitution of due process, equal  
 27 protection under the law has been violated by Defendant and  
 28 loss of property, a pension, has affected his life, and liberty.  
 (FAC 1.) In essence, Plaintiff alleges that the VA acted improperly in denying his  
 pension claim. These allegations clearly demonstrate that Plaintiff seeks review of the  
 VA’s denial of his claim for pension benefits, which, as stated in *Veterans for Common  
 Sense*, is outside the scope of this Court’s subject matter jurisdiction. As the Ninth

1 Circuit instructed in *Veterans for Common Sense*, this Court must cede jurisdiction  
 2 over Plaintiff's claim challenging the VA's denial of pension benefits, and Plaintiff  
 3 "must seek a forum in the Veterans Court and the Federal Circuit." *Veterans for*  
 4 *Common Sense*, 678 F.3d at 1025.

5 Accordingly, having also reviewed Plaintiff's opposition, which fails to address  
 6 the impact of *Veterans for Common Sense* and the VJRA, the Court **DISMISSES**  
 7 **WITHOUT PREJUDICE** Plaintiff's constitutional claim and any other potential  
 8 claim arising from the VA's denial of pension benefits. *See Veterans for Common*  
 9 *Sense*, 678 F.3d at 1025.

#### 11 **B. The CDA and Tucker Act**

12 The CDA applies to any express or implied contract made by an executive  
 13 agency for: (1) the procurement of property, other than real property; (2) the  
 14 procurement of services; (3) the procurement of construction, alteration, repair, or  
 15 maintenance of real property; or (4) the disposal of personal property. 41 U.S.C. §  
 16 7102 (formerly cited as 41 U.S.C. § 602). Under the CDA, claims are first submitted  
 17 in writing to the contracting officer, who must issue a decision in writing. 41 U.S.C.  
 18 § 7103. Upon receipt of the contracting officer's final decision, the contractor must  
 19 elect either to appeal the decision to either the appropriate board of contract appeals or  
 20 the Court of Federal Claims. *Id.* § 7104(a)-(b).

21 Under the Tucker Act, "[t]he United States Court of Federal Claims shall have  
 22 jurisdiction to render judgment upon any claim against the United States founded either  
 23 upon the Constitution, or any Act of Congress or any regulation of an executive  
 24 department, or upon any express or implied contract with the United States . . . in cases  
 25 not sounding in tort." 28 U.S.C. § 1491(a)(1). The Little Tucker Act grants the district  
 26 court jurisdiction to hear a "claim against the United States, not exceeding \$10,000 in  
 27 amount founded . . . upon any express or implied contract with the United States . . .  
 28 in cases not sounding in tort[.]" 28 U.S.C. § 1346(a)(2). These provisions, read

1 together, “create a presumption of the exclusive jurisdiction in the Court of Federal  
 2 Claims [for contract claims over \$10,000], but that presumption can be overcome by  
 3 an independent statutory grant of jurisdiction to another court.” *Tritz v. U.S. Postal*  
 4 *Serv.*, 721 F.3d 1133, 1137 (9th Cir. 2013); *see also Suburban Mortg. Assocs., Inc. v.*  
 5 *U.S. Dep’t of Hous. & Urban Dev.*, 480 F.3d 1116, 1121 (Fed. Cir. 2007).

6       Insofar as Plaintiff asserts a contract claim in the amount of \$18,000,000, this  
 7 Court lacks jurisdiction under both the CDA and Tucker Act. *See* FAC 1 (“The  
 8 Veteran is also claiming that there is a contract breach by the Defendant because of  
 9 nonperformance after notification of the usurpation of these rights.”). Under both  
 10 statutes, the appropriate forum for Plaintiff’s contract claim, assuming he fulfilled his  
 11 statutory obligations, such as, for example, first submitting a claim to the contracting  
 12 officer under the CDA, is the Court of Federal Claims. *See* 41 U.S.C. § 7104(a)-(b);  
 13 28 U.S.C. § 1491(a)(1). Consequently, the Court **DISMISSES WITHOUT**  
 14 **PREJUDICE** Plaintiff’s contract claim.

### 15 16       **C. Federal Torts Claim Act**

17       The Federal Torts Claim Act (“FTCA”) waives sovereign immunity of the  
 18 United States for certain torts committed by federal employees. *Fed. Deposit Ins.*  
 19 *Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (citing 28 U.S.C. § 1346(b)). The FTCA  
 20 provides that district courts have exclusive jurisdiction of civil actions against the  
 21 United States for money damages “for injury or loss of property, or personal injury or  
 22 death caused by the negligent or wrongful act or omission of any employee” of the  
 23 federal government while acting within the scope of his office or employment. 28  
 24 U.S.C. § 1346(b).

25       The United States is the only proper defendant in a suit brought pursuant to the  
 26 FTCA. *Fed. Deposit Ins. Corp. v. Craft*, 157 F.3d 697, 706 (9th Cir. 1988); *Kennedy*  
 27 *v. U.S. Postal Serv.*, 145 F.3d 1077, 1078 (9th Cir. 1998). “A claim against [a federal  
 28 agency] in its own name is not a claim against the United States.” *Kennedy*, 145 F.3d

1 at 1078. An agency is not a proper defendant under the FTCA. *Craft*, 157 F.3d at 706.

2 Furthermore, “[t]he FTCA bars claimants from bringing suit in federal court until  
3 they have exhausted their administrative remedies.” *McNeil v. United States*, 508 U.S.  
4 106, 113 (1993). “The timely filing of an administrative claim is a jurisdictional  
5 prerequisite to the bringing of a suit under the FTCA, and, as such, should be  
6 affirmatively alleged in the complaint.” *Gillespie v. Civiletti*, 629 F.2d 637, 640 (9th  
7 Cir. 1980).


8 It is unclear from the complaint whether Plaintiff is pursuing a tort claim. But  
9 if he is, he fails to satisfy at least two requirements under the FTCA. First, Plaintiff  
10 fails to name the United States as the defendant; instead, he names an agency and  
11 several individuals as defendants. *See Kennedy*, 145 F.3d at 1078. And second,  
12 Plaintiff fails to affirmatively allege in the FAC that he timely filed an administrative  
13 claim with the appropriate agency. *See Gillespie*, 629 F.2d at 640. Therefore, insofar  
14 as Plaintiff asserts a tort claim, the Court **DISMISSES WITHOUT PREJUDICE** the  
15 tort claim.

16  
17 **III. CONCLUSION & ORDER**

18 In light of the foregoing, the Court finds that it lacks subject matter jurisdiction  
19 over Plaintiff’s action and **DISMISSES WITHOUT PREJUDICE** this action in its  
20 entirety. *See Tosco*, 236 F.3d at 499.

21 **IT IS SO ORDERED.**

22  
23 **DATED: October 5, 2015**

24   
25 **Hon. Cynthia Bashant**  
26 **United States District Judge**  
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